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In The

Supreme Court of the United States

October Term, 1992

GEORGE GUY DERDEN, III,

Petitioner,

vs.

SHERIFF SAMMIE McNEEL and MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX FOR PETITIONER

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TABLE OF CONTENTS

Page

Appendix C — Memorandum Opinion of the United States District Court for the Northern District of Mississippi, Eastern Division Dated March 19, 1989 ..... 25a

Appendix D — Report and Recommendation in the United States District Court for the Northern District of Mississippi, Eastern Division Filed February 7, 1990 ..... 37a

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION DATED MARCH 19, 1989

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. EC 88-187-D-D

GEORGE GUY DERDEN, III

Petitioner

v.

SHERIFF SAMMIE MCNEEL AND MISSISSIPPI DEPARTMENT OF CORRECTIONS

Respondents

MEMORANDUM OPINION

This matter comes before the court on petitioner and respondents' objections to a report and recommendation filed by United States Magistrate Jerry A. Davis dated February 7, 1990, which recommended petitioner's writ of habeas corpus be granted. After reviewing the record, the report and recommendation, and the objections to the report and recommendation,[1] the court is of the opinion that the report and recommendation should be adopted in part and overruled in part.

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1. Although respondents' objections were not timely filed, the court will consider them in making its decision.

Appendix C

In April 1986, petitioner was convicted of burglary in the Clay County Circuit Court and sentenced to serve a term of seven years in the custody of the Mississippi Department of Corrections. He is presently incarcerated in the Lowndes County Jail in Columbus, Mississippi. Petitioner filed the present action pursuant to 28 U.S.C. § 2254 alleging as error: (1) that he was denied a fair trial in a fair tribunal; (2) that a directed verdict should have been entered or alternatively, that the verdict was against the overwhelming weight of the evidence; (3) that the sentence imposed was excessive; (4) that the state withheld evidence; and (5) that he was denied effective assistance of counsel.

The magistrate concluded that petitioner is not entitled to relief on claims 2 through 5. The court agrees and adopts sections II through IV of the magistrate's report as the opinion of the court. Petitioner's first claim, that he was denied a fair trial in a fair tribunal, is based upon nine separate alleged errors at trial. Although the magistrate concluded that none of the nine alleged errors standing alone entitle petitioner to relief, the cumulative effect of the trial errors had the effect of rendering his trial fundamentally unfair.[2] The court agrees that none of the nine alleged errors standing alone entitles petitioner to relief. The court, however, disagrees that the cumulative effect of the trial errors rendered the trial fundamentally unfair or that such cumulative effect entitles petitioner to relief.

Although the Fifth Circuit has indicated a willingness to

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2. Respondents argued that the court is precluded from recognizing the cumulative error claim because petitioner did not raise that claim in his petition. The petition alleged that each error "contributed" to the denial of a fair trial. Construing the petition liberally, the court concludes that petitioner raised the cumulative error claim in the petition. *Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988).

consider the cumulative prejudice resulting from trial errors in direct appeals from criminal convictions, *see United States v. Cochran,* 697 F.2d 600, 608 (5th Cir. 1983), it has also indicated that cumulative error is not a proper basis upon which to grant habeas corpus relief. *Mullen v. Blackburn,* 808 F.2d 1143, 1147 (5th Cir. 1987).

In *Mullen,* the court considered several claims of petitioner: (1) that identification evidence was improperly admitted; (2) that a photograph was improperly admitted; (3) that hearsay testimony was improperly admitted; (4) that the trial judge improperly referred to petitioner as a "subject"; (5) that he was improperly denied a transcript of the voir dire proceedings; (6) that he had ineffective assistance of counsel; and (7) that the presentence report contained inaccurate information. The court analyzed each claim and determined that no claim warranted habeas corpus relief. Petitioner also claimed that the claims collectively entitled him to relief. The court refused to consider petitioner's claim.

> Mullen finally asserts that even if none of his claims entitles him to relief individually, all of them collectively, do. Habeas relief is available only where a prisoner is in custody in violation of the Constitution or of federal law. 28 U.S.C. § 2254. Mullen cites no authority in support of his assertion, which, if adopted, would encourage habeas petitioners to multiply claims endlessly in the hope that, by advancing a sufficient number of claims, they could obtain relief even if none of these had any merit. We receive enough meritless habeas claims as it is; we decline to adopt a rule that would have the effect of soliciting more and

> has nothing else to recommend it. Twenty times zero equals zero.

Mullen, 808 F.2d at 1147. *Byrd v. Armontrout*, 686 F. Supp. 743, 784 (E.D. Mo. 1988), *aff'd*, 880 F.2d 1 (1989). *See also Lee v. Lockhart*, 754 F.2d 277, 279 (8th Cir. 1985) (each claim of constitutional error in a habeas corpus petition must stand on its own).

The court finds *Mullen* controlling precedent in the case *sub judice*. Standing alone, none of petitioner's claims warrant habeas relief. None of the alleged violations rise to the level of constitutional error. Since none of the claims rendered the trial fundamentally unfair to the extent that petitioner was denied due process of law under the fourteenth amendment, *see LaRoche v. Wainwright*, 599 F.2d 722, 726 (5th Cir. 1979), the court is of the opinion that petitioner is not entitled to habeas corpus relief.[3]

Even if the cumulative error argument were recognized by the Fifth Circuit and the prejudices suffered by petitioner due to errors that, by themselves, do not reach constitutional magnitude could be aggregated, the court disagrees with the magistrate that the case

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3. Although *Mullen* indicates that cumulative errors cannot be aggregated to find constitutional error, the court notes that the cumulative error argument might be persuasive in a case where constitutional errors exist and the analysis becomes one of harmless error. *See Kirkpatrick v. Blackburn*, 777 F.2d 272, 280 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178, 106 S. Ct. 2907 (1986). Accumulating the prejudice resulting from constitutional errors might convince a court that harmless error plus harmless error does not necessarily equal harmless error. *See Lundy v. Campbell*, 888 F.2d 467, 472 n.3 (6th Cir. 1989). But harmless error analysis is conducted only after a finding of constitutional error. *Kirkpatrick*, 777 F.2d at 280.

Appendix C

sub judice is one where the aggregate of the errors produced a trial that was so fundamentally unfair that petitioner was denied due process of law. The Sixth Circuit, which recognizes the cumulative prejudice approach, *Walker v. Engle,* 703 F.2d 959, 962-63 (6th Cir. 1983), *cert. denied,* 474 U.S. 962, 104 S. Ct. 396 (1983), stated the due process test as follows: "whether the asserted trial errors, measured according to the fundamental principles of a fair criminal process implicit in the due process clause of the fourteenth amendment, were so egregious as to have nullified the legitimacy of the properly admitted substantive evidence of the defendant's guilt." *Lundy,* 888 F.2d at 473.

The magistrate concluded that "the trial judge's demeanor coupled with the prosecutor's over-zealous actions combined to produce a prejudicial atmosphere that prevailed throughout petitioner's trial." Report and Recommendation p. 31. The following actions of the trial judge were cited as prejudicial.

> DEFENSE COUNSEL:
> I have one other brief—very brief witness, your honor.
>
> THE COURT:
> All right, if it's not brief, I'm going to make it brief.
> (Tr. 537).

During defense counsel's closing argument, the prosecution objected to a certain part of defense counsel's argument. The court responded to the objection by stating:

> THE COURT:
> I just wasn't paying attention; I don't know

what was said counsel, but you may proceed. (Tr. 582).

Included in the magistrate's analysis as an error of prejudicial force is the judge's admonitions to petitioner while petitioner was testifying in his own defense. The admonitions were as follows:

DEFENSE COUNSEL:

Assuming Turner was telling the truth, and that van was — Had gone from West Point over to Pheba after you'd filled up in Columbus and made a slight detour toward Starkville, and then gone up to Houston in your opinion would that van have needed any gas in it in Houston?

PETITIONER:

That van could have gone to Memphis, Tennessee, without needing any gas.

THE COURT:

It will not be received into evidence. Let me caution the witness. Mr. Derden, I don't care if it had gone to Memphis or Chicago and the jury don't either; just answer his question, do you understand?

PETITIONER:

Yes, sir.

THE COURT:

All right, you may proceed.
(Tr. 466-67).

Appendix C

* * *

PETITIONER:
Sir, can I make a statement?

THE COURT:
No. Your lawyer can adequately represent you.
(Tr. 468-69).

* * *

DEFENSE COUNSEL:
Mr. Derden, how long did it take you to measure that house up yonder in Houston?

PETITIONER:
I measured two houses. I would — I would say I was at the first house approximately maybe an hour, and then I was at the second house like I said I talked to the people because the man was interested in selling some carpet in the Houston area he indicated.

THE COURT:
Just a minute. Witness, he asked you a simple question, how long did it take you to measure the houses. He didn't ask you who you talked to or what the conversation was. Just answer the question, how long did it take you to measure the two houses?
(Tr. 482-83).

* * *

Appendix C

PROSECUTION:

And the amount of a van load full, is that correct?

PETITIONER:

(witness looks through records) There was nineteen rolls; one of them was two hundred and forty-eight feet and nine inches long. Oh, I'm sorry, that's the accumulated total.

THE COURT:

Mr. Derden, can't you just answer whether or not it was a van load full or half full or a quarter full.

PETITIONER:

It was — it was a van load full, sir. I had nineteen rolls.

THE COURT:

All right, that's what he asked you.
(Tr. 492).

* * *

PROSECUTION:

That's a receipt that you had, is that right, Mr. Derden? You testified from a gas ticket that you had, a receipt that you had put nine — so many gallons of gas in your — in your van on — on the ninth of February, is that right?

PETITIONER:

I certainly did, yes, sir.

Appendix C

PROSECUTION:

Now, of course, there's nothing on that thing to tell us when that was made out, is there, Mr. Derden?

PETITIONER:

Well, I've been in jail, Ladies and Gentlemen, since January twenty, eighty — eight-five —

THE COURT:

Just a minute, face the lawyer and answer the lawyer's questions, and you do not address the jury, you understand? I'm not going to caution you about this again.
(Tr. 499).

* * *

PETITIONER:

Could I not answer that question he asked me, sir if I know the answer to it?

THE COURT:

When you answer a question answer yes or no, you understand? If it needs an explanation I'll let you explain your reason, but first answer yes or no.
(Tr. 507).

The magistrate concluded that the trial judge's statements, exclusive of other alleged errors, were not qualitatively or quantitatively substantial enough to lead the jury to a predisposition of guilt by improperly confusing the functions of

judge and prosecutor. Report and Recommendation p. 17. *See also United States v. Davis*, 752 F.2d 963, 974 (5th Cir. 1985). After reviewing the proceedings as a whole, the court agrees that the trial judge's actions did not render the trial fundamentally unfair. There were statements by the judge that should have been avoided or, at least, worded differently to prevent the appearance of bias. But all in all, the court cannot conclude that the statements led the jury to conclude that the judge was prejudiced against petitioner.[4]

The magistrate's conclusion is also based upon errors committed by the prosecution. The prosecution committed error during the voir dire proceedings in asking the jurors if they would weigh the co-conspirators' testimony as they would weigh any other testimony. The prejudice from that incorrect statement of the law was greatly minimized by the court's curative instruction to the jury at the close of trial that co-conspirator's testimony should be viewed with great caution and suspicion. The prosecution's statement certainly falls short of constitutional error. *See Kirkpatrick*, 777 F.2d 272. The prosecution also extracted information from a witness regarding prior crimes allegedly committed by petitioner. The court sustained defense counsel's objection to the testimony and instructed the jury to disregard the testimony. The court finds no constitutional error here since the court properly sustained the objection and issued the curative instruction. The trial was not rendered fundamentally unfair because the jury heard evidence of other crimes, especially when it was instructed to disregard that testimony. *See Blankenship v.*

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4. The court notes that at the conclusion of the evidence the trial court instructed the jury that it was his responsibility to make rulings on the admissibility of evidence and that the jury "should not infer, however, from any of the court's rulings that the court has any opinion on the merits of the case favoring one side or the other." (Tr. 562-63).

Estelle, 545 F.2d 510, 516 (5th Cir. 1977), *cert. denied*, 444 U.S. 856 (1979). The court concludes that any prejudice suffered by petitioner regarding the evidence of other crimes and the voir dire questioning is minimal in light of the curative instructions given by the court.

Even if such claims could be aggregated to obtain a cumulative sum of prejudices, the sum would not be enough to render the trial fundamentally unfair. If a due process claim is asserted that does not claim a violation of one of the provisions of the Bill of Rights incorporated into the fourteenth amendment by the due process clause, due process is violated only if the defendant's trial was fundamentally unfair. *See Kirkpatrick*, 777 F.2d at 278, 280. The test for determining whether a trial is fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Kirkpatrick*, 777 F.2d at 278-79. *See also Guidroz*, 852 F.2d at 835. After reviewing the trial transcript in its entirety, the court does not find that a reasonable probability exists that the verdict might have been different had the foregoing errors not been committed. There was ample evidence from which a jury could infer petitioner's guilt. The prosecutorial comments resulted in minimal prejudice as did the testimony regarding petitioner's previous criminal activities. Furthermore, the comments of the judge did not have a substantial impact on petitioner's credibility or the perceived validity of his defense. The trial was not perfect, but neither was it fundamentally unfair.

Therefore, that part of the magistrate's report and recommendation which recommends that habeas relief be granted on the basis that petitioner was denied due process of law because the cumulative sum of trial errors rendered the trial fundamentally unfair should be overruled. The remainder of the report and

recommendation should be adopted as the opinion of the court.

THIS 19th day of March, 1989.

s/ Glen H. Davidson
United States District Judge

APPENDIX D — REPORT AND RECOMMENDATION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION FILED FEBRUARY 7, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

NO. EC88-187-D-D

GEORGE GUY DERDEN, III

Petitioner

V.

SHERIFF SAMMIE MCNEEL AND MISSISSIPPI DEPARTMENT OF CORRECTIONS

Respondents

REPORT AND RECOMMENDATION

This cause comes before the court on the petition of George Guy Derden, III for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In April, 1986, Derden was convicted of burglary in the Clay County Circuit Court and sentenced to serve a term of seven years in the custody of the Mississippi Department of Corrections. He is presently incarcerated in the Lowndes County Jail in Columbus, Mississippi. He has exhausted his available state remedies and now seeks review in this court.

Derden cites as error: (1) That he was denied a fair trial in a fair tribunal; (2) that a directed verdict should have been entered or,

alternatively, the verdict was against the overwhelming weight of the evidence; (3) that the sentence imposed was excessive; and (4) that the state withheld evidence.

I. A Fair Trial in a Fair Tribunal

As the first ground in support of his petition for habeas corpus relief, Derden argues that he was denied a fair trial in a fair tribunal. This argument is based upon nine separate alleged errors at trial.

Derden states that the specter of fundamental unfairness began at the pretrial hearing. He argues that no less than five witnesses testified at the pretrial hearing that the same police officers who investigated this burglary had been guilty of serious misconduct toward Derden in a previous arson investigation. Derden claims that these two officers suborned perjury in connection with the burglary investigation.

The state trial court conducted a hearing prior to trial on Derden's motion to dismiss for denial of due process (Tr. 82-188). Several witnesses, including Derden, gave testimony concerning the allegations made against the two officers. The trial court found that there was no proof of any conspiracy to "get" Derden.

Pursuant to 28 U.S.C. § 2254(d), the factual determinations of a state court, made after a hearing on the merits of the issue, must be premused to be correct unless the federal court explicitly finds that one of eight exceptions applies. *Lavernia v. Lynaugh*, 845 F.2d 493, 499-500 (5th Cir. 1988) *citing Sumner v. Mata*, 449 U.S. 539, 544-46, (1981); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). When a trial court fails to render express findings on credibility but makes a ruling that depends upon an implicit determination that credits one witness's testimony as being truthful, or implicitly

discredits another's, such determinations are entitled to the same presumption of correctness that they would have been accorded had they been made explicitly. *Lavernia*, 845 F.2d at 500 *citing Marshall*, 459 U.S. at 433-34.

The undersigned concludes that the trial court's finding that there was no conspiracy to "get" Derden must be presumed to be correct under § 2254(d). Although Derden's co-conspirators were not present to testify,[1] other witnesses did testify and the hearing was full and fair. Furthermore, Derden has failed to establish any of the eight exceptions listed in § 2254(d). Consequently, the trial court's findings are presumed to be correct.

Derden next claims that he was denied the *opportunity to adduce evidence*. He states that though he made a timely request for subpoenas for the two co-conspirators, neither one was present at the pretrial hearing.[2] Derden also claims that it was fundamentally unfair for the trial court to deny his request for permission to run an advertisement in a local newspaper offering a reward for any person who could supply the identity of the person

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1. The co-conspirators had been subpoenaed by Derden's counsel. (Tr. 85) However, the subpoenas were not served upon the co-conspirators personally but upon their attorneys at the direction of Derden's counsel. (Tr. 160) The court ruled that such service was not proper process on the witnesses. (Tr. 85, 161) Derden's counsel wanted to further show possible improper activity by the two police officers by questioning the co-conspirators about any plea bargain they had entered into in exchange for their testimony against Derden. (Tr. 159-60) The trial court found that such testimony would be cumulative. (Tr. 160) The state agreed to furnish Derden's counsel with the agreements. (Tr. 161)

2. As noted *supra*, Derden's counsel advised the clerk that if the two co-conspirators could not be found, the subpoenas should be served on their attorneys. (Tr. 160) The court ruled that this was improper service. (Tr. 161)

for whom Derden was allegedly measuring carpet at the time of the burglary. He claims that this refusal "contrasted remarkably with the fact that the state was offering a huge reward to the witnesses who testified against Derden."

The role of a federal court is more limited than that of the state appellate court. *Skillern v. Estelle,* 720 F.2d 839, 852 (5th Cir. 1983). The federal courts hold no supervisory power over state judicial proceedings, and federal habeas corpus relief is appropriate only when a conviction has been obtained in violation of some constitutionally protected right. *Smith v. Phillips,* 455 U.S. 209, 221 (1981). A federal habeas corpus court's inquiry is restricted to those aspects of the trial affecting a petitioner's federal constitutional rights. *Donnelly v. De Christofero,* 416 U.S. 637 (1974). The undersigned concludes that the instant two claims do not evince a constitutional violation.

Petitioner next contends that he was denied a fair trial when, during the voir dire examination, the prosecutor attempted to obtain promises by the jurors to believe the testimony of the co-conspirators who would be state witnesses. Derden claims that these three co-conspirators had been promised freedom in exchange for their testimony.

During the voir dire examination, the following exchange occurred:

> MR. ALLGOOD:
>
> Very well, The court has — has told you somewhat of the nature of this case. Now it is — it is a burglary of a business. Now the state expects the proof to show that there was a

number of people that went out to burglarize that building on this particular evening. As a matter of fact, five is what the state expects the proof to show. Now three of those people are going to testify for the state, and I think it's going to become apparent that — that there had been what has usually called quote "deals" unquote made with these three other people in order to — to — for them to testify. Now my questions to you in this regard is simply this: First of all, do any of you feel that such testimony, such arrangements, if you will, are inherently untruthful, would inherently cause the witness not to tell the truth?

MR. WAIDE:

Your honor, if the court please, I object to that; that's a question for the jury to determine as to whether it would. I don't think he's — this is the proper time to be arguing about that.

MR. ALLGOOD:

I'm not arguing, your honor, I'm asking a question.

THE COURT:

All right, just ask questions.

MR. ALLGOOD:

Thank you, your honor.

Appendix D

THE COURT:

Don't argue your case.

MR. ALLGOOD:

Do any of you feel that such testimony from such witnesses is inherently untruthful?
(no response)

MR. ALLGOOD:

If you have any reservations about that, now would be the time to raise your hand.

MR. WAIDE:

Your honor, if the court please, for the record I do object to that. I think it's an improper question, incorrect according to law.

THE COURT:

All right, the record will reflect your objection. You may proceed. I believe they've answered the question, counselor.

MR. ALLGOOD:

Thank you, your honor.

Appendix D

THE COURT:

Now would anybody — anybody simply disregard the testimony of those witnesses simply because of a plea bargain arrangement with them?

MR. WAIDE:

If the court please, I object to that now; the jury may entirely disregard it if they find from the evidence it should be disregarded, and that's an improper question.

THE COURT:

The court will instruct them on that, counselor, at the proper time.

MR. ALLGOOD:

Would anybody simply disregard their testimony simply because of that plea bargain arrangement?
(no response)

MR. ALLGOOD:

All right, second, on this one point; would any of you automatically disbelieve it just because it was made in this context?
(no response)

Appendix D

MR. ALLGOOD:

Okay, there is — basically what I'm trying to get to and I — and — and as I understand it, you are all telling me that you will weigh their testimony as you would anybody else's. If anybody says that they cannot do that, that they could not weigh their testimony as they would anybody else's would you please indicate it now be raising your hand?

MR. WAIDE:

Your honor, to which I object because they're not entitled as a matter of law to have their testimony weighed and anybody else's. That's an incorrect statement of the law.

THE COURT:

The court will properly instruct them on the —

MR. ALLGOOD:

Thank you, your honor.

THE COURT:

— Believability or credibility of witnesses at the proper time. Let's move on.

Appendix D

MR. ALLGOOD:

> Thank you, your honor.
> Is that — if any of you have any problem with that statement that would weigh their testimony as you would anybody else's, would you please raise your hand?
> (no response)

(Tr. 127-131)

Derden argues that the prosecutor was permitted to obtain the jurors' promise to disregard the law in Mississippi that co-conspirators' testimony is to be regarded with caution and suspicion. *See, Winters v. State,* 449 So.2d 766, 771 (Miss. 1984).

The United States Supreme Court has held that a prosecutor's remarks must be more than undesirable or even universally condemnable before reversal is warranted; instead, the prosecutor's remarks must infect the trial with such unfairness as to make the resulting conviction a denial of due process. *Bell v. Lynaugh,* 828 F.2d 1085, 1095 (5th Cir. 1987), *citing Darden v. Wainwright,* 477 U.S. 168, 181 (1986). Prosecutorial statements may violate due process in two ways. First, prosecutorial statements may implicate a specific provision of the Bill of Rights incorporated into the Fourteenth Amendment by the Due Process Clause. *Rogers v. Lynaugh,* 848 F.2d 606, 608 (5th Cir. 1988). Second, if prosecutorial statements do not implicate any such other incorporated constitutional right, they may constitute a denial of due process generally.[3] *Rogers,* 848 F.2d at 608, *citing Donnelly v.*

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3. This is sometimes called a "generic substantive due process" violation. *See, Rogers,* 848 F.2d at 608; *Kirkpatrick v. Blackburn,* 777 F.2d 272, 280 (5th Cir. 1985).

De Christofero, 416 U.S. 637, 643 (1974). The case law supplies a different test for each kind of due process violation.

In the case of an asserted generic due process violation, the court asks "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Rogers*, 848 F.2d at 5 608, *citing Darden v. Wainwright*, 477 U.S. 168, 181. Under this test, although the asserted prosecutorial misconduct may have made the defendant's trial less than "perfect," that imperfection must have rendered the trial "unfair" in order to be "constitutional error." *Rogers, Id.* at 609, *citing Darden*, 477 U.S. at 183 n. 15. Thus, a court may decide that the asserted imperfection in the trial did not rise to the level of constitutional error without having to apply a harmless error test. *Darden*, 477 U.S. at 183 n. 15.

The Fifth Circuit has developed the following test of constitutional error when a generic due process violation is asserted: "The test applied to determine whether a trial error makes a trial fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Rogers*, 848 F.2d at 609, *citing Kirkpatrick*, 777 F.2d at 281. The *Rogers* court further stated that there is "such unfairness only if the prosecutor's remarks evince either persistent and pronounced misconduct or . . . the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred." *Rogers*, 848 F.2d at 609, n. 7, *citing Kirkpatrick*, 777 F.2d at 278-79 (*quoting Fulford v. Maggio*, 692 F.2d 354, 359 (5th Cir. 1982).

In the case of asserted prosecutorial misconduct implicating some other incorporated constitutional right such as the right to remain silent, the court asks "whether or not the [prosecutor's]

statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Rogers*, 848 F.2d at 609, *citing Milton v. Procunier*, 744 F.2d 1091, 1095 (5th Cir. 1984). If under this test the prosecutorial misconduct is constitutional error, the court must generally inquire further whether or not the error is harmless. *Rogers, Id. citing Chapman v. California*, 386 U.S. 18, 21-26 (1967).

The undersigned concludes that petitioner's contention lies within the first of the two areas in which prosecutorial statements may violate due process. Since Derden has not alleged that a specific provision of the Bill of Rights was violated by the quoted comments, he has stated a claim of denial of due process generally.

The Mississippi Supreme Court addressed the instant claim on direct appeal and held:

> First it should be noted that the district attorney was attempting to determine whether or not the prospective jurors would automatically disbelieve the testimony of the co-conspiraters. In doing so he came perilously close to extracting a promise from the jurors and he did misstate the law to the panel.
>
> The district attorney could have asked of the panel "if any one of them would automatically reject the testimony of a co-conspirator as untrue simply because he was a co-conspirator? That would have been sufficient.

Appendix D

> Error was committed when the prosecutor said to the jury that they could weigh the testimony of the co-conspirators just as they would anybody else's. Defense counsel properly objected at that point on the grounds that that was not a correct statement of law and the court did not sustain the objection. However, when it came time to instruct the jury on the law the trial court quite properly granted the following instruction:
>
> I charge you that Jay Posey, Willie James Sherrod and Tommy Turner have admitted being accomplices to this burglary.
>
> You are to regard this testimony with great suspicion and to consider it with caution.
>
> Had the trial judge not granted this instruction, the colloquy set out above would constitute reversible error and an abuse of discretion by the trial judge and it would be necessary for this court to reverse the conviction. However, because the trial judge properly granted the "caution and suspicion" instruction the jury was properly instructed as to the law and the conviction can be affirmed.

Derden v. State, 522 So.2d 752, 754 (Miss. 1988).

The undersigned must agree. Applying the tests set forth in *Rogers, supra*, the undersigned cannot conclude that a due process violation occurred in the instant cause. In reviewing the voir dire questions for possible prejudice in the context of the trial as a

whole, *Passman v. Blackburn*, 652 F.2d 559, 567 (citations omitted), the questions asked by the prosecution in light of the curative jury instruction, did not infect the trial with unfairness as to make the resulting conviction a denial of due process. Nor, had the questions not been asked, is there a reasonable probability that the verdict might have been different. *See Jones v. Butler*, 864 F.2d 348, 356 (5th Cir. 1988) ("to establish that a prosecutor's remarks are so inflammatory, the petitioner must demonstrate that the misconduct is persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks") (citations omitted); *Byrne v. Butler*, 845 F.2d 501, 508 (5th Cir. 1988). Therefore, the instant argument must also be rejected.

Derden next argues that the trial judge's conduct denied him a fair trial. Initially, petitioner contends that the trial judge frustrated offense counsel's attempt to make an opening statement by sustaining the prosecution's objection to the defense's opening statement. On four separate occasions the prosecution objected that defense counsel was "arguing the case." (Tr. 253-258) The trial judge sustained the objection each time and directed defense counsel to refrain from arguing his case. Derden now claims that this action "may have influenced the jury to believe that the defense was not to be believed."

Derden also contends that he was improperly admonished by the trial court on several occasions. Derden argues that these admonitions, within the hearing of the jury, "could have left no impression other than that he [the trial judge] had a poor opinion of Derden and of his defense." He claims that the following exchanges denied him a fair trial:

> Q Assuming Turner was telling the truth, and that Van was — had gone from West Point over

to Pheba after you'd filled up in Columbus and made a slight detour toward Starkville, and then gone up to Houston in your opinion would that van have needed any gas in it in Houston?

A That van could have gone to Memphis, Tennessee, without needing any gas.

MR. WAIDE:

Tender that last document into evidence, your honor.

THE COURT:

It will not be received into evidence. Let me caution the witness, Mr. Derden, I don't care if it had gone to Memphis or Chicago and the jury don't either; just answer his question, do you understand?

A Yes, sir.

THE COURT:

Q All right, you may proceed.

(Tr. 466-67)

* * *

Q Did you have — what did you do the next day?

Appendix D

A I installed carpet at — in Columbus — in the Columbus, Mississippi area.

Q Do you have any invoices or business records showing where you were when you installed the carpet the next day?

A Yes, sir, I do.

Q Do — could you produce those for me?

MR. ALLGOOD:

If your honor please, I — I'm going to object to those on the same basis; these were not provided to us in discovery; it's the first time I've ever heard of any such receipts.

MR. WAIDE:

Actually —

MR. ALLGOOD:

I don't think they have any relevancy whatsoever —

THE COURT:

Let him get through, counselor.

Appendix D

MR. ALLGOOD:

— Any relevancy whatsoever, and I'm going to object to them on that basis.

MR. WAIDE:

Your honor, that's absolutely false, and I'll produce the records where I kept asking them to go over and look at George's records in the jail and he never would go, and I have the letters I've sent to him asking him to go look at them.

MR. ALLGOOD:

If your honor please —

THE COURT:

Counsel, he's testified where he was. Now I don't know what you're trying to do with the records. If you've got witnesses here that made these records and can properly validate them and the people he worked for here to testify that he was there that day, then I'll let them in; otherwise, I am not going to let these records in. He can testify where he was and what he did.

MR. DERDEN:

Sir, can I make a statement?

Appendix D

THE COURT:

No, your lawyer can adequately represent you.

(Tr. 468-69)

* * *

Q Mr. Derden, how long did it take you to measure that house up yonder in Houston?

A I measured two houses. I would — I would say I was at the first house approximately maybe an hour, and then I was at the second house like I said I talked to the people because the man was interested in selling some carpet in the Houston area he indicated.

THE COURT:

Just a minute. Witness, he asked you a simple question, how long did it take you to measure the houses. He didn't ask you who you talked to or what the conversation was. Just answer the question, how long did it take you to measure the two houses.

A I said I was at the first house approximately an hour; I left the second house sometime the best of my estimate was before midnight on two nine.

(Tr. 482-83)

Appendix D

* * *

Q I'm sure it is. You unloaded that material there in Columbus, is that correct?

A At the carpet store in Columbus, yes, sir.

Q And the amount of a van load full, is that correct? (witness looks through records) There was nineteen rolls; one of them was two hundred and forty-eight feet and nine inches long. Oh, I'm sorry, that's the accumulated total.

THE COURT:

Mr. Derden, can't you just answer whether or not it was a van load full or half full or a quarter full.

A It was — it was a van load full, sir. I had nineteen rolls.

THE COURT:

All right, that's what he asked you.

Q And you got gas at the Pak and Pok all right that night, Mr. Derden, but you got it and you put it in your van because you were running out of gas from running down to Maben and across and coming up, is that not right, Mr. Derden?

Appendix D

A I had gassed my van in Columbus, Mississippi; I had put thirty-five to forty gallons of gasoline in it, and I've already stated how — that I got seven miles to the gallon in it, and ladies and gentlemen, y'all know how far it would run on that kind of gas mileage, two hundred and fifty miles —

Q Now you —

A — Sixty miles or seventy miles.

Q That's a receipt that you had, is that right, Mr. Derden? You testified from a gas ticket that you had a receipt that you had, a receipt that you had put nine — so many gallons of gas in your — in your van on — on the ninth of February, is that right?

A I certainly did, yes, sir.

Q Now, of course, there's nothing on that thing to tell us when that was made out, is there, Mr. Derden?

A Well I've been in jail, ladies and gentlemen, since January twenty, eighty — eighty-five —

THE COURT:

Just a minute. Face the lawyer and answer the lawyer's questions, and you do not address

> the jury, you understand? I'm not going to caution you about this again.

(Tr. 499)

The respondents in the instant cause argue that this court should not consider this claim because it was not raised at trial and is thus procedurally barred pursuant to the Mississippi contemporaneous objection rule and *Wainright v. Sykes*, 433 U.S. 72 (1977). However, the record does not contain any opinion or order from the Mississippi Supreme Court that clearly and expressly states that its decision on this claim rests on a procedural bar. Therefore, the undersigned finds that this court may proceed to the merits of the instant claim. *See, Booker v. Lynaugh*, 872 F.2d 100, 101 (5th Cir. 1989).

In *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977), the Fifth Circuit stated:

> A trial judge must exhibit neutrality in his language and in the conduct of a trial before a jury. He should avoid any possibility of prejudicing the jury through his criticism of or hostility toward defense counsel. (citations omitted) Of course a trial judge is not required to remain silent and passive throughout a jury trial. To the contrary, he has a duty to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilatory tactics of counsel. (citations omitted)

Appendix D

> But in performing this duty he must make every effort to preserve the appearance of strict impartiality. The opinion of the judge, on account of his position and the respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part. (citations omitted) The judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question. (citations omitted)

See also, United States v. Bartlett, 633 F.2d 1184, 1188 (5th Cir. 1981).

In determining whether the trial judge overstepped the limits imposed on judge's conduct, this court must view the proceedings as a whole. *United States v. Carpenter,* 776 F.2d 1291, 1294 (5th Cir. 1985) *citing United States v. Middlebrooks,* 618 F.2d 273, 277 (5th Cir. 1980); *United States v. James,* 528 F.2d 999, 1022 (5th Cir. 1976). To constitute constitutional error, the trial court's actions, viewed as a whole, must amount to intervention which could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor. *United States v. Davis,* 752 F.2d 963, 974 (5th Cir. 1985) (citations omitted). Such judicial intervention must be qualitatively and quantitatively substantial to meet this test. *Davis,* 752 F.2d at 974 *citing United States v. Robinson,* 687 F.2d 359, 361 (11th Cir. 1982).[4]

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4. The undersigned realizes that the cases cited which deal with alleged judicial misconduct are factually distinguishable from the instant case in that the cited cases

(Cont'd)

Appendix D

While the undersigned agrees that the record reflects tension between the court and Derden, the incidents cited fail to disclose any conduct on the part of the trial judge that gives rise to a constitutional violation. In such a case as Derden's, where the verdict depends almost exclusively on the credibility of the witness, the trial judge's comments to Derden on page 466 and page 499 of the trial record come dangerously close to an improper comment upon the accused's credibility. However, when viewing the record as a whole, the comments are not qualitatively and quantitatively substantial so that the jury could have been led to a predisposition of guilt. Furthermore, Derden's attack upon the discretionary rulings of the trial court with regard to the opening statement, does not amount to a constitutional violation. *See, David v. Maggio,* 706 F.2d 568 (5th Cir. 1983). The claims involving prejudicial misconduct must fail.

Derden next states that the trial court's admission of hearsay evidence contributed to the denial of a fair trial. On cross-examination of Derden, the state asked about a statement allegedly made to Sheriff McNeel by one Richard Dismuke.[5] The defense objected and moved for a mistrial on the ground of hearsay. The trial court sustained the objection and overruled the motion for mistrial. (R. 506) The state then introduced into evidence the written statement made by Derden to Sheriff McNeel which also contained the hearsay statement by Richard Dismuke.[6] (R. 506-08)

(Cont'd)
involve federal district judges. However, the standard for analyzing judicial conduct for constitutional violations remains the same.

5. Mr. Dismuke had been subpoenaed by defense counsel five days before trial. (Tr. 506) However, he was not present to testify at trial.

6. The defense had previously offered the statement as evidence. (Tr. 504)

Appendix D

After the introduction of the written statement into evidence, the state asked Derden whether he recalled Sheriff McNeel relating to him [Derden] a statement made to the Sheriff by Dismuke. Again, the defense moved for a mistrial, but the court overruled since the hearsay statement was already in evidence. (R. 506-10) Petitioner now claims that the admission of this statement was clearly prejudicial and violated his right to a fair trial.

A federal court in habeas corpus petition reviewing state evidentiary rulings does not sit as a super state supreme court to review error under state law. *Bridge v. Lynaugh,* 838 F.2d 770 (5th Cir. 1988). The United States Court of Appeals for the Fifth Circuit has firmly established resistance to challenges of evidentiary matters by habeas corpus petitions. *See, Bryson v. Alabama,* 634 F.2d 862, 864 (5th Cir. 1981); *Woods v. Estelle,* 547 F.2d 269, 271 (5th Cir. 1977). As a general rule, admissibility of evidence is a matter of state law, and only a contention that the admission of the evidence rendered the trial fundamentally unfair or violated a specific constitutional right will be considered in a federal collateral proceeding. *Johnson v. Blackburn,* 778 F.2d 1044, 1050 (5th Cir. 1985), *citing Meyer v. Estelle,* 621 F.2d 769, 771 (5th Cir. 1980).

This court's inquiry is restricted to those aspects of the trial affecting a petitioner's federal constitutional rights. *Donnelly v. DeChristofero,* 416 U.S. 637 (1974). An evidentiary error in a state trial does not justify federal habeas corpus relief unless it is of such magnitude as to constitute a denial of fundamental fairness under the Due Process Clause. *Skillern,* 720 F.2d at 852; *Bridge,* 838 F.2d at 772; *Porretto v. Stalder,* 834 F.2d 461, 465 (5th Cir. 1987); *Lowenfield v. Phelps,* 817 F.2d 285, 296 (5th Cir. 1987). This court cannot provide collateral relief simply because the state court's challenged conduct would have led to reversal if the petitioner had been tried in the federal system, *Blankenship v. Estelle,* 545 F.2d

510, 516 (5th Cir. 1977), nor is relief authorized even if state evidentiary rules appear to have been violated. *Blankenship,* 545 F.2d at 516; *see also, Anderson v. Maggio,* 555 F.2d 447, 451 (5th Cir. 1977) ("the mere violation of evidentiary rules by the state trial court does not in itself invoke habeas corpus relief. . .").

As a guideline to applying the criterion of fundamental fairness, the erroneous admission of prejudicial evidence can justify habeas corpus relief only if it is material in the sense of a crucial, critical, highly significant factor in the context of the entire trial. *Anderson v. Maggio,* 555 F.2d 447, 451 (5th Cir. 1977); *Bridge v. Lynaugh, supra* at 772; *Porretto v. Stalder, supra* at 465; *Thomas v. Lynaugh,* 812 F.2d 225, 230 (5th Cir. 1987); *Milton v. Procunier,* 744 F.2d 1091, 1097 (5th Cir. 1984); *Skillern v. Estelle, supra,* at 852.

Derden argues that the admission of the hearsay statement was crucial impeachment evidence since the issue of whether or not Derden swapped cars at Dismuke's night club with one of the co-conspirators lay at the heart of the defense. Derden claims that by allowing the prosecution to discredit his testimony by using hearsay statements denied him a right to a fair trial.

The undersigned agrees that the statement allegedly made by Dismuke to the sheriff was blatant hearsay. The undersigned also agrees that the statement was crucial impeachment evidence which lay at the heart of Derden's defense. Furthermore, the undersigned is troubled that defense counsel did not have an opportunity to cross-examine Dismuke about the statement since he was not present at trial though a subpoena had been issued for him. Such "back door" techniques as used in this instance to admit otherwise inadmissible evidence is not conducive to producing fundamentally fair trials.

However, as noted previously, Derden's counsel had earlier moved the court to receive into evidence Derden's written statement which contained the hearsay. (Tr. 504) The court did not rule on the motion at that time. *Id.* Subsequently, while cross-examining Derden about the hearsay statement, the prosecution joined in the defense's motion to introduce the written statement into evidence. (Tr. 506-507) It was then received into evidence without objection or exception from the defense. (Tr. 507) When the prosecution again questioned Derden about Dismuke's statement, the defense objected to the question on the grounds of hearsay. (Tr. 509) The trial court overruled the objection because the entire written statement had already been received into evidence. (Tr. 509)

In Mississippi, a defendant cannot complain on appeal of alleged errors invited or induced by himself. *Singleton v. State,* 518 So.2d 653, 655 (Miss. 1988) *citing Davis v. State,* 472 So.2d 428 (Miss. 1985); *Browning v. State,* 450 St.2d 789 (Miss. 1984); *Jones v. State,* 381 So.2d 983 (Miss. 1980). When injection of inadmissible evidence is attributable to the actions of the defense, the defense cannot later object to such invited error. *United States v. Raymer,* 876 F.2d 383, 388 (5th Cir. 1989); *United States v. Lemaire,* 712 F.2d 944, 948 (5th Cir. 1983); *United States v. Doran,* 564 F.2d 1176, 1177 (5th Cir. 1977); a *United States v. Taylor,* 508 F.2d 761, 763 (5th Cir. 1975). The undersigned concludes that by moving to introduce the written statement in support of Derden's testimony, Derden's counsel made a tactical decision and invited the erroneous admission of the hearsay. Derden cannot now be heard to attack the trial court's ruling and the claim must fail.

Derden next argues that the delay in bringing him to trial contributed to the denial of a fair trial. He claims that this delay caused him to be unable to locate his alibi witnesses and hindered

the memory of anothe memory of another important witness.[7]

The burglary for which Derden was convicted occurred on February 10, 1983. Though Derden may have been a suspect he was not indicted until October, 1985. (Tr. 3)[8] He was served with the arrest warrant on or about January 23, 1986, (Tr. 152) and arraigned on January 28, 1986. (Tr. 4) The pretrial hearing on motions was held on April 3, 1986, and the trial began on April 14, 1986.

In Mississippi, an accused must usually be brought to trial within 270 days of arraignment. MISS CODE ANN §99-17-1 (Supp. 1989). Since Derden's trial began only sixty-six days after he was arraigned, his claim does not come within the mandate of §99-17-1.

The primary limitation on the government's ability to bring stale criminal charges is found in the statute of limitations. *United States v. Scott,* 795 F.2d 1245, 1249 (5th Cir. 1986) *citing United States v. Marion,* 404 U.S. 307, 322 (1971). The statute of limitations is the principal device that protects a defendant from prejudice arising from a lapse in time between the commission of a

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7. Part of Derden's defense at trial was that he was in Houston, Mississippi on the night of the burglary measuring two houses for carpet he was to install. He could never recall the names of the customers or the location of the houses even though the sheriff took Derden to Houston in an attempt to locate the houses. (Tr. 500-505).

Derden also stated that he had talked to a Houston police officer on the night of the burglary and had asked him for directions to a gas station. The officer, Jack Nabors, testified that he had seen Derden before but could not recall the exact time, place, or date. (Tr. 513-516).

8. Derden was not directly implicated in the burglary for one and one-half years. (Tr. 168-69, 171-72, 404)

crime and an indictment or arrest. *Dickerson v. Louisiana,* 816 F.2d 220, 228 (5th Cir. 1987) *citing United States v. Lovasco,* 431 U.S. 783, 789 (1977) and *Marion,* 404 U.S. at 322. However, in Mississippi, burglary has no statute of limitations. *See,* MISS CODE ANN §99-1-5 (Supp. 1989). Therefore, there was no statute of limitations bar to the charges brought against Derden.

The Speedy Trial Clause of the Sixth Amendment to the United States Constitution also places limitations upon the government's ability to allow charges to grow stale. However, the right to a speedy trial attaches only upon the defendant becoming an accused. *United States v. Hutchins,* 818 F.2d 322, 326 (5th Cir. 1987) *citing Marion, supra,* at 313. A person is not an accused unless he or she is either formally charged or else arrested on criminal charges. *Hutchins,* 818 F.2d at 326 *citing Marion* at 320. In *Marion,* the Supreme Court stated:

> Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty of public accusations: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context.

404 U.S. 321, 322. Public suspicion is not sufficient to justify the delay in favor of a defendant's speedy trial claim. *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986). The Speedy Trial Clause does not limit the length of a criminal investigation even though "the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life." *Loud Hawk*, 474 U.S. at 312 *quoting United States v. MacDonald*, 456 U.S. 1, 9 (1982). When a defendant is not incarcerated or subjected to other substantial restrictions on his liberty, a court should not weigh the time prior to that towards a claim under the Speedy Trial clause. *Loud Hawk*, 474 U.S. at 312. The undersigned concludes that Derden's claim involves a preindictment/prearrest delay; therefore, the speedy trial claim must fail.

The third and final limitation against bringing overly stale claims lies in the Fifth Amendment's Due Process Clause. The Due Process Clause of the Fifth Amendment requires dismissal of an indictment if it were shown at trial that the preindictment delay caused substantial prejudice to a defendant's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the defendant. *Marion, supra* at 324. *See also, United States v. Stumpf*, 827 F.2d 1027, 1030 (5th Cir. 1987) ("To establish that the delay in securing an indictment violated his due process right [A defendant must prove] that he suffered actual prejudice as a result of the delay.") The defendant claiming the violation bears the burden of proving actual prejudice. *Stumpf*, 827 F.2d at 1030 (citations omitted). Mere passage of time does not constitute actual prejudice nor do speculative allegations such as an alleged loss of witnesses or evidence, or unproven charges of deliberate tactical delay. *United States v. Coppola*, 788 F.2d 303, 308 (5th Cir. 1986) *citing United States v. Lovasco*, 431 U.S. 783 (1977). Actual prejudice cannot be proven through generalized claims of memory loss or by a claim that delay necessarily causes prejudice. *Scott*, 795 F.2d at 1249.

Appendix D

The undersigned concludes that Derden has failed to show actual prejudice and has failed to show deliberate delay by the prosecution. Therefore, he has failed to sustain his burden of proof and his speedy trial claim must fail.

In support of his claim that he was denied a fair trial, Derden next contends that the trial court allowed defense witness Pam Smith to be improperly cross-examined about her failure to come forward with a statement. On cross-examination, the prosecution repeatedly asked Smith questions concerning her failure to give a statement to the police prior to her arrest. (Tr. 527) Derden's counsel objected on the basis of the witness' privilege against self-incrimination but was overruled. *Id.*

The respondents argue that the cases cited in Derden's brief are inapplicable here. The undersigned agrees. *Doyle v. Ohio,* 426 U.S. 610 (1976) and *Austin v. State,* 384 So.2d 600 (Miss. 1980) deal with instances where an accused's post-arrest/post-*Miranda* silence was questioned. Such is not the case here. Witness Smith was questioned by the prosecution about her pre-arrest silence.

The respondents also argue that Derden lacks standing to challenge any alleged infringement of Smith's Fifth Amendment Rights. The undersigned agrees that the Fifth Amendment privilege is personal to the witness and cannot be invoked by a defendant or third party for their own benefit. *United States v. Colyer,* 571 F.2d 941, 945 (5th Cir. 1978).

The undersigned concludes that the questions posed to the witness did no render the trial fundamentally unfair. The questions asked merely properly attempted to impeach the credibility of the witness who claimed she loved Derden. (Tr. 528)

Appendix D

Derden next argues hat the jury was improperly allowed to hear evidence of other crimes he was allegedly involved in. Derden claims that the following exchange on the redirect examination of state witness Will Sherrod rendered his trial unfair:

> Q. Now, you were charged with a number of armed robberies in Lowndes County and a number of robberies in Alabama, is that correct?
>
> A. That's right.
>
> Q. And Mr. Waide cross-examined you on these, is that right?
>
> A. Right.
>
> BY MR. WAIDE:
>
> Your Honor, if the Court please, I object to this and I'd like to make a record on it outside the presence of the jury. It's improper indirect. It's grossly improper as Mr. Allgood knows and I'd like to make a record on this because I think I know what he's fixing to try to do.
>
> BY THE COURT:
>
> Well I don't and he . . . you asked him about these burglaries. At this time the objection is overruled.

Appendix D

BY MR. ALLGOOD:

Q. In all of these robberies, who was involved with you?

A. George Derden.

BY MR. WAIDE:

Your Honor I specifically object on the grounds that now he is trying to prove other crimes that Mr. Derden has not been charged with today, and it is all prejudicial.

BY THE COURT:

All right the objection is now sustained and the jury will be admonished to disregard that remark.

(R.295-96)

Derden argues that this question violated the rule in Mississippi that, generally, the prosecution may not introduce evidence of another crime separate from that charged in the indictment and for which the accused in being tried. *See, Bolin v. State*, 4889 So.2d 1091, 1092 (Miss. 1986).

As noted in *Blankenship, supra*, habeas corpus relief is not authorized even if state evidentiary rules appear to have been violated. Also, the objection to the question was sustained and the jury was admonished to disregard the remark. Furthermore, defense counsel had cross-examined Sherrod about his prior

criminal conduct and the state could properly continue that questioning on re-direct examination. In light of the curative instruction, the undersigned concludes that the testimony regarding the separate crimes, standing alone, did not render the entire trial fundamentally unfair.

Derden's final contention regarding the fundamental fairness of his trial is that the alleged errors discussed *supra* had the cumulative effect of rendering his trial fundamentally unfair. The undersigned agrees.

Where the cumulative effect of trail errors is of such magnitude as to offend a sense of justice, is denied and the writ will issue. *Bowens v. Coiner,* 309 F. Supp. 1064, 1071 (S.D.W.V. 1970) *citing Rochin v. California,* 342 U.S. 165, 169 (1951). Though a bright line test for relief under a cumulative effect argument has not been formulated, the Fifth Circuit has acknowledged "the principle of synergistic prejudice and [is] willing to examine sums and multiples when they are presented." *United States v. Cochran,* 697 F.2d 600, 608 (5th Cir. 1983).

The prejudicial atmosphere of Derden's trial begins with the trial judge. As noted above, the trial judge was openly hostile toward Derden and his counsel on several occasions and did not attempt to conceal his hostility. This hostility continued throughout the trial as evidenced by the court's comment toward the end of the defense's case-in-chief:

> MR. WAIDE:
>
> I have one other brief – very brief witness, your honor.

Appendix D

THE COURT:

All right, if it's not brief, I'm going to make it brief.

(Tr. 537)

Furthermore, during defense counsel's closing argument, the prosecution objected to a certain part of defense counsel's argument. The court responded, "I just wasn't paying attention; I don't know what was said counsel, but you may proceed." (Tr. 582) These comments coupled with the admonitions given to petitioner that were discussed earlier could leave no other impression with the jury than that the trial judge had little regard for the petitioner or his defense. The comments that called into question the petitioner's credibility were particularly critical since the resolution of this case depended on the jury's assessment of credibility of the various witnesses. Based upon the hostile atmosphere created by the trial judge's remarks and attitudes, the undersigned finds that the jury had no choice but to also harbor negative attitudes toward Derden and his defense which probably affected their view of the evidence. While the comments viewed alone would not warrant habeas corpus relief, they must be considered in context of the other elements of the trial that leads to a conclusion that petitioner was not afforded a fair, impartial tribunal.

Next, the undersigned finds that the district attorney's actions in the prosecution of this case were overly zealous. The supreme Court and the several federal appellate courts have long recognized that the prosecutor has a distinctive role in criminal prosecutions. As representative of the government the prosecutor is compelled to seek justice, not convictions. Justice is served only when

convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. Those rules have evolved with the underlying principle that criminal convictions should be based upon guilt clearly proven in a calm, reflective atmosphere, free of undue passion and prejudice. *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989).

As noted earlier, petitioner was not implicated in this burglary until one and one-half years after the crime and only after deals were cut in the interim with petitioner's co-conspirators, Sherrod, Turner, and Posey.[9] Moreover, as previously discussed, the prosecutor during voir dire attempted to elicit promises from the jury that they would weigh the co-conspirators' testimony equally with any other witness' testimony. While the trial judge correctly instructed the jury on this point at the close of the trial, the prosecutor should have known that this line of voir dire was improper. Such questions clearly infected the jury with the wrong concept of law.

During the redirect examination of the state's first witness, co-conspirator Will Sherrod, the district attorney also successfully, though improperly, informed the jury of other crimes in which Derden allegedly was involved. (Tr. 296) Although the defense's objection was sustained and the jury admonished to disregard the questions, the damage had been done. There can be no doubt that the district attorney knew this question was an evidentiary rule violation, but disregarded the rule in order to get this prejudicial information before the jury. A prosecutor's improper suggestions "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own

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9. Sherrod and Posey were not indicted for burglary and Turner received a five year suspended sentence with five years probation.

view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985). After a thorough review of the trial transcript, the undersigned finds that the prosecution's general attitude and demeanor did not produce a trial free of undue passion and prejudice, but evidenced a clear desire to convict petitioner at all costs.

The undersigned concludes that the trial judge's demeanor coupled with the prosecutor's over-zealous actions combined to produce a prejudicial atmosphere that prevailed throughout petitioner's trial. Though Derden may be guilty of the burglary charge, his conviction must be obtained within the rules. All of these actions by the trial court and the prosecutor had the principal effect of improperly questioning petitioner's credibility before the jury in a case that hinged on credibility choices. Such a trial atmosphere clearly infects the jury's judgment and creates a situation in which the determination of guilt or innocence is not based on a reasoned review of the evidence.

II. SUFFICIENCY OF THE EVIDENCE

Derden argues that a directed verdict should have been entered or, in the alternative, the verdict was against the overwhelming weight of the evidence. He claims that "it was totally physically impossible for the burglary to have taken place as described by the state's own witnesses."

Derden states that independent witnesses left no doubt that the burglary occurred at approximately 12:30 a.m. and that burglars Posey and Sherrod, the burglars who were left at the scene when the other burglars fled in the vehicle, arrived back in West Point, Mississippi at 2:00 a.m. or 2:05 a.m. He also states that the testimony of Sheriff McNeel and burglar Turner established that

the drive from the scene of the crime to West Point, along the route Turner claims he, Derden and Pam Smith took, would have taken over three hours. Derden argues that this inconsistency made it physically impossible for the co-conspirators to be telling the truth. Liberally construing this claim, *Haines v. Kerner,* 404 U.S. 519 (1972), the undersigned will treat it as an attack upon the sufficiency of the evidence.

In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Supreme Court set forth the standard of review to be applied in federal habeas corpus claims which allege that a state court conviction was based on insufficient evidence. In *Jackson,* the petitioner had been convicted of first-degree murder. *Id.* at 309. The Supreme Court recognized in *Jackson* that a sufficiency-of-the-evidence habeas corpus claim "can almost always be judged on the written record without need for an evidentiary hearing in the federal courts." *Id.* at 322.

In *Jackson,* there was no question that the petitioner had shot the deceased, but the crucial issue was whether he had specifically intended to kill her. *Id.* at 324. The court reviewed the record in the light most favorable to the prosecution and applied the relevant state law defining premeditation to test whether a rational factfinder could have reasonably found the petitioner guilty of premeditated murder. *Id.* The court concluded:

> From the circumstantial evidence in the record, it is clear that the trial judge could reasonably have found beyond a reasonable doubt that the petitioner did possess the necessary intent at or before the time of the killing.

Id. at 324-25.

Appendix D

. . .

> [A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

Id. at 326. The court concluded that the appropriate standard for reviewing sufficiency of evidence claims in collateral attacks upon state criminal convictions is that:

> The applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Id. at 324.

This standard was employed by the Fifth Circuit in *Autry v. Estelle*, 706 F.2d 1394, 1407 (5th Cir.), *reh. denied*, 464 U.S. 1 (1983). In *Autry*, the petitioner alleged that there was insufficient evidence presented at trial to support his conviction of murder committed during an attempt to rob. *Id.* at 1407. The Fifth Circuit held that a state court rule requiring independent evidence of "corpus delecti" of attempted robbery had no independent constitutional basis. *Id.* Although the evidence presented at trial showed nothing had been stolen from the murder victims or from the cash register of the store in question, the Fifth Circuit held that a rational trier of fact could have concluded that the murders were committed during the course of an armed robbery, since there was

"no other reasonable hypothesis." *Id.* at 1408. The Supreme Court denied a request for rehearing in *Autry*, and stated that "Federal Courts are not forums in which to relitigate state trials." *Autry v. Estelle*, 464 U.S. 1, 3 (1983). In *Barefoot v. Estelle*, 463 U.S. 880 (1982), the Supreme Court further explained that the primary avenue for challenging the validity of a conviction is the "direct appeal" and when that process is completed, a presumption of finality and legality attaches to the conviction. *Id.* at 887.

After a complete and thorough review of the extensive trial testimony, the undersigned must conclude that petitioner's trial revolved around the credibility of the witnesses' testimony. The undersigned finds that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found petitioner guilty beyond a reasonable doubt.[10] Moreover, it is well-settled that a federal court may not substitute its own judgment regarding the credibility of witnesses for that of the state courts. *Marter v. Blackburn*, 777 F.2d 1007, 1012 (5th Cir. 1985); *Dunn v. Maggio*, 712 F.2d 998, 1001 (5th Cir. 1983). Although as previously discussed, the credibility choices for the jury were tainted by the prejudicial trial atmosphere. Therefore, petitioner's claim based on the sufficiency of the evidence must fail.

III. THE SENTENCE

Derden contends that the seven year sentence imposed upon him is excessive in light of the fact that none of the other co-conspirators received any incarceration for this burglary. He argues that since the trial judge did not conduct a presentence investigation before he sentenced Derden, the only possible

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10. The resolution of this claim is considered without regard to the previous determination of the cumulative errors that resulted in an unfair forum.

ground for the differing treatment was Derden's decision to go to trial rather than plead guilty.

In *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit held that a life sentence under the Texas habitual criminal statute violated the Eighth Amendment because the sentence was grossly disproportionate to the crimes. The defendant had been sentenced to life after having been convicted three separate times for property-related felonies. On appeal to the United States Supreme Court, the Fifth Circuit was reversed and the Court held that the sentence did not violate the cruel and unusual punishment prohibition. *Rummel v. Estelle*, 445 U.S. 263 (1980). The Supreme Court stated that "whatever views may be entertained regarding severity of punishment, whether one believes in its efficacty of its futility, . . . these are peculiarly questions of legislative policy." *Rummel*, 445 U.S. at 283, n.27., *quoting Gore v. United States*, 357 U.S. 386, 393 (1958); *see also, Hutto v. Davis*, 454 U.S. 370, 374 (1982).

Moreover, the Supreme Court has held that a reviewing court should not consider the severity of a sentence that has been set within statutory limits, particularly on habeas corpus review. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). The Fifth Circuit has stated, that "while not reviewing the severity of a sentence, this court will, however, carefully scrutinize the judicial process by which punishment was imposed." *United States v. Cimino*, 659 F.2d 535, 537 (5th Cir. 1982); see also, *United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981); *United States v. Cauazos*, 530 F.2d 4, 5 (5th Cir. 1976); *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir. 1976); *United States v. Fay*, 267 F.2d 507, 510 (2nd Cir. 1959). As long as the trial court stays within statutory bounds and respect procedural safeguards, the sentence may be reversed only

for arbitrary or capricious abuse of discretion. *United States v. Wheeler,* 802 F.2d 778, 783 (5th Cir. 1986); *United States v. Garcia*, 693 F.2d 412, 415 (5th Cir. 1982).

The undersigned finds that the trial court imposed the seven year sentence pursuant to *Miss. Code Ann.* § 97-17-33 (1972). Therefore, finding no abuse of discretion by the trial judge and giving great deference to the Mississippi legislature in setting the punishment for persons convicted to burglary, the undersigned finds no basis on which to interfere in this case.

Furthermore, the fact that Derden received a prison term and the other co-conspirators did not does not present grounds for habeas corpus relief. *See, Buchannon v. Wainwright*, 474 F.2d 1006 (5th Cir. 1973). Also, the failure to procure a presentence report does not provide a basis for habeas relief. *See, Roman v. Parrish*, 328 F. Supp. 882 (E.D. Va. 1971).

IV. THE RADIO LOG

Derden next contends that the state withheld exculpatory evidence after the defense had made a general request (Tr. 7) for the prosecution to produce all exculpatory evidence. He claims that the state failed to produce the Clay County sheriff's radio log for 2/9/83 and 2/10/83. Derden argues that the entries on this radio log proves that state witnesses Hugh Stevenson and Sheriff Sammie McNeel perjured themselves at trial. Both Stevenson and McNeel testified that, according to the radio log, Stevenson called the sheriff's office at 1:00 a.m. in order to run an identification check on Mississippi license plate #MJ30501. (Tr. 384, 387, 409) However, the radio log sheet shows that Stevenson did not make the call until 2:05 a.m. Derden now claims that this alleged perjured testimony and the concealment of alleged exculpatory evidence rendered his trial unfair.

Appendix D

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Therefore, in order to establish a violation of this rule, a defendant must prove: (1) the prosecution suppressed evidence, (2) the suppressed evidence was favorable to the defense, and (3) the suppressed evidence was material to the defense. *United States v. Lanford*, 838 F.2d 1351, 1355 (5th Cir. 1988); *United States v. Lassiter*, 819 F.2d 84, 86 (5th Cir. 1987); *Brogdon v. Blackburn*, 790 F.2d 1164, 1167 (5th Cir. 1986). "Only when omitted evidence is deemed material can a defendant successfully claim that nondisclosure deprived him of his constitutional right to a fair trial." *Porretto v. Stalder*, 834 F.2d 461, 464 (5th Cir. 1987), *citing United States v. Agurs*, 427 U.S. 97, 108 (1976).

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court recognized three distinct situations in which the *Brady* doctrine applies and enumerated standards for determining materiality in each circumstance.[11] First, where the prosecution knew or should have known that the conviction was based on false testimony, a new trial is mandated if there is a reasonable likelihood that the false testimony could have affected the jury verdict. *Agurs*, 427 U.S. at 104.[12] Second, if there was no disclosure of information despite a specific defense request, the test is whether the suppressed evidence might have affected the

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11. *See also, United States v. Bagley*, 473 U.S. 667, 678 (1985), *United States v. Mesa*, 660 F.2d 1070, 7076 (5th Cir. 1981); *United States v. Anderson*, 574 F.2d 1347, 1354 (5th Cir. 1978); *Garrison v. Maggio*, 540 F.2d 1271, 1273 (5th Cir. 1976).

12. This category is illustated by *Giglio v. U.S.*, 405 U.S. 150 (1972).

outcome of the trial. *Id.*[13] Finally, in the event of a general request for *Brady* material, or no request at all, a new trial is necessary if the omitted evidence, when viewed in the context of the entire record, created a reasonable doubt that did not otherwise exist. *Id.* at 112-113.[14] However, in *United States v. Bagley*, 473 U.S. 667 (1985) the Supreme Court reformulated two of the three different materiality tests into one all encompassing test. In *Bagley*, the prosecutor failed to disclose evidence that the defense might have used to impeach the government's witnesses by showing bias or interest. Although the court restated the three categories and the three tests for materiality as defined by *Agurs*, the court held that the test for materiality set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), was the proper test to be used in each of the "no request", "general request", and "specific request" situations. *Bagley*, 473 U.S. at 62. The court stated:

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request", and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

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13. *Brady v. Maryland* itself is an illustration of this category.

14. Illustrated by *Agurs*.

Id., see also, Barnes v. Lynaugh, 817 F.2d 339 (5th Cir. 1987); *United States v. McKellar*, 798 F.2d 151, 153 (5th Cir. 1986).

The *Bagley* Court further held that, in light of the totality of the circumstances, a reviewing court may consider any adverse effect that the prosecutor's failure to release information might have had on defendant's preparation and presentation of his case. *Bagley*, 473 U.S. at 682; *see also, United States v. McKellar*, 798 F.2d 151, 153 (5th Cir. 1986). However, if a defendant either knew or should have known of the existence of exculpatory evidence and its value to the defense, the prosecutor is not obliged under *Brady* to furnish the disputed evidence. *United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir. 1987). Furthermore, if a defendant could have obtained the exculpatory evidence with reasonable diligence, a *Brady* violation does not arise. *Ramirez*, 810 F.2d at 1343. Notwithstanding that the prosecution has no duty to disclose evidence about which the defendant knew or should have known, there is no requirement of pretrial disclosure of *Brady* material. *Id.*

In the discovery motion submitted by the defense, a general *Brady* request was made. (Tr. 7) Therefore, the test to be applied is the test for the third category as set forth in *Agurs*: a new trial is necessary if the omitted evidence, when viewed in the context of the entire record, created a reasonable doubt that did not otherwise exist. Furthermore, the test for materiality will be that of *Strickland*: evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

The undersigned concludes that the radio log is not exculpatory evidence. The radio log could have been used to impeach the witnesses; however, the utility of the radio log as an impeachment device could not have been recognized until the

witnesses testified at trial. Though the radio log is favorable evidence for Derden's time factor/time frame defense, it cannot be said that the result of the trial would have been different had the radio log been introduced into evidence.

To justify habeas corpus relief on a perjured testimony claim, a petitioner must show that the state knowingly used perjured testimony. *Avery v. Procunier*, 750 F.2d 444, 448 (5th Cir. 1985). The instant claim being liberally construed under *Haines v. Kerner*, 404 U.S. 519 (1972), petitioner has basically presented a *Giglio*[15] claim that the prosecution knowingly allowed false testimony to be presented at trial. To prevail on such a claim, the petitioner must prove (1) that the testimony was actually false; (2) that it was material; and (3) that the prosecution knew it was false. *Griffith v. United States*, 535 F.2d 320, 321 (5th Cir. 1976); *Little v. Butler*, 848 F.2d 73, 76 (5th Cir. 1988); *Avery v. Procunier*, 750 F.2d 444, 447-48 (5th Cir. 1985).

Petitioner has failed to prove that the testimony was false. While the testimony is inconsistent with the entries on the radio log, Derden has made no affirmative showing that the call did not come in at 1:00 a.m. In addition, he has failed to prove that had the witnesses not testified that the call came into the sheriff's office at 1:00 a.m., the verdict would have been different. Derden's *Giglio* claim also must fail.

Derden also claims that this "new evidence" renders the jury's verdict against the overwhelming weight of the evidence. However, the mere existence of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

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15. *Giglio v. United States*, 405 U.S. 150 (1972).

It is well-settled that the federal courts are not forums in which to relitigate state trials. *Autry, supra.*

Finally, in once again applying the *Jackson v. Virginia* test, the undersigned concludes that even in light of this new evidence, the trier of fact could have found Derden guilty beyond a reasonable doubt even though this evidence impeaches the testimony of state witnesses.[16]

V. Assistance of Counsel

Derden's final contention in support of his petition for habeas corpus relief is that he was denied effective assistance of counsel. Derden claims that his retained counsel, Honorable Jim Waide of Tupelo, Mississippi, was generally ineffective and deficient in performing his duties as defense counsel. He also claims that Mr. Waide was ineffective for failing to subpoena Ricky Forrester as a defense witness and for failing to serve the sheriff's radio log. Derden's contentions are without merit.

To merit habeas corpus relief on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test applies to retained counsel as well as appointed counsel.[17] *See, Bonvillain v. Blackburn*, 780 F.2d 1248 (5th Cir. 1986); *Murry v. Maggio*, 736 F.2d 279 (5th Cir. 1984). In *Strickland*, the Supreme Court held that before post-conviction

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16. Although standing alone this ground is insufficient for habeas corpus relief, it is "another brick in the wall" of cumulative errors.

17. *Strickland's* two-prong standard is applied to appellate counsel as well as trial counsel. *McCrae v. Blackburn*, 793 F.2d 684 (5th Cir. 1986).

relief can be granted for ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different. *Strickland*, 466 U.S. at 687, 688; *see also, Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988); *Lavernia v. Lynaugh*, 845 F.2d 493 (5th Cir. 1988); *Bridge v. Lynaugh*, 838 F.2d 770 (5th Cir. 1988); *Thomas v. Lynaugh*, 812 F.2d 225 (5th Cir. 1987); *Martin v. McCotter*, 796 F.2d 813 (5th Cir. 1986). Thus, both a deficiency and resulting prejudice must be shown. *United States v. Lewis*, 786 F.2d 1278, 1281 (5th Cir. 1986). A petitioner's failure to establish both prongs of the *Strickland* test warrants rejection of his claim. *Bates v. Blackburn*, 805 F.2d 569, 578 (5th Cir. 1986).

Under the deficiency prong of the *Strickland* test, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687; *see also, Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988). However, the Fifth Circuit has noted the following:

> In determining whether counsel's performance satisfies the requirements of the Sixth Amendment, we must inquire whether, considering all of the circumstances, counsel's performance was reasonable under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential; we must make every effort to eliminate the distorting effects of hindsight and

> evaluate the conduct from counsel's perspective at the time.

Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). In applying the first *Strickland* criterion, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action might be considered sound trial strategy. *Bridge v. Lynaugh*, 838 F.2d at 773; *quoting Strickland v. Washington*, 466 U.S. at 689. Finally, counsel is given great deference with a strong presumption that counsel has exercised reasonable professional judgment. *Martin v. McCotter*, 796 F.2d 816, 817 (5th Cir. 1986).

It is not enough to show that some, or even most, defense lawyers would have handled the case differently. *Green v. Lynaugh*, 868 F.2d 176 (5th Cir. 1989). As the Supreme Court has observed, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after a conviction." *Strickland*, 466 U.S. at 689. "It is likewise too facile 'for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.' " *Green, supra* at 178 *citing Strickland*, 466 U.S. at 689.

The prejudice prong of the *Strickland* test requires a showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. It is not enough for the petitioner to show that the errors had some conceivable effect on the outcome of the proceeding, *Sawyer v. Butler*, 848 F.2d 582, 588 (5th Cir. 1988); the petitioner must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sawyer*, 848 F.2d at 588, *Strickland*, 466 U.S. at

694. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *Summitt v. Blackburn*, 795 F.2d 1237, 1242 (5th Cir. 1986); *see also, Lavernia v. Lynaugh, supra*. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Summitt*, 795 F.2d at 1242. A habeas corpus petitioner must affirmatively plead this resulting prejudice. *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988).

Because both the deficiency and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact, the court must make an independent determiniation of whether counsel's representation satisfied the Sixth Amendment. *Martin v. McCotter*, 796 F.2d 813, 817 (5th Cir. 1986), *citing Mattheson v. King*, 751 F.2d 1432, 1438 (5th Cir. 1985), *cert dismissed*, 475 U.S. 1138.

In this case counsel's alleged deficiencies did not prevent any appellate review, nor did appellate counsel entirely fail to subject the prosecution's case to meaningful adversarial testing; therefore, the standard set forth in *Strickland* requiring "an identifiable lapse in the performance of the attorney" must be applied. *Hamilton v. McCotter*, 772 F.2d 171, 181-82 (5th Cir. 1985).

Petitioner argues that Mr. Waide was deficient in his preparation for trial and in his representation at trial. A thorough review of the entire trial record reveals that this claim is simply not true. Mr. Waide tendered more than adequate assistance of counsel. Derden's attack on Mr. Waide's trial strategy and tactics concerning the time factor/time frame defense, including the radio log, is not grounds for habeas corpus relief and reflects the benefit of hindsight. *Strickland v. Washington, supra*.

Appendix D

Petitioner claims that counsel was ineffective because he failed to interview and call a certain witness, Ricky Forrester. Petitioner fails to make a proffer of evidence as to what Forrester's testimony would have been. It is not logical to think that Forrester, not having been indicted, would have testified that he originated the burglary idea and exonerated Derden. The undersigned notes that complaints of uncalled witnesses are not favored in federal habeas corpus review. *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984), *citing Boyd v. Estelle*, 661 F.2d 388, 390 (5th Cir. 1981). Furthermore, petitioner must overcome a strong presumption that counsel's decision to not call the suggested witnesses was a strategic one. *Murray*, 736 F.2d at 282. In evaluating whether counsel's representation fell below an objective standard of reasonableness, a court's scrutiny must be highly deferential with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Marker v. Blackburn*, 777 F.2d 1007, 1010 (5th Cir. 1985). Given all the circumstances of the case at bar, the undersigned concludes that petitioner has failed to overcome the strong presumption that his trial counsel's conduct fell within the range of reasonable professional assistance. Derden's entire ineffective assistance of counsel claim must fail.

VI. Conclusion

For the reasons stated above, the undersigned respectfully recommends that the instant petition for habeas corpus relief be granted and that he be released from custody unless given a new trial wthin 120 days of the date of the final order of this court.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file objections to the findings and recommendations herein contained. Objections are required to be in writing and must be filed within ten

days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging such findings and recommendations on appeal. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

Respectfully submitted, this 7th day of February, 1990.

s/ Jerry Davis
UNITED STATES MAGISTRATE